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Citizenship and the Franchise

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Abstract: The struggle for universal suffrage has been a paradigmatic political struggle in the modern state, as people have striven to achieve full and equal citizenship. This chapter examines - from a conceptual, legal and historical perspective - the 'selection' of voters as one of the core hallmarks of citizenship in modern democracies. It explores the ways in which the ideas and practices of citizenship intersect with the right to vote, allowing us to probe the contribution of citizenship as a legal status underpinning the definition of the franchise to democratic self-government as a political ideal.

Keywords: citizenship, franchise, voting rights, suffrage, electoral rights, elections, referendums, democracy, demos

1. Introduction

The right to vote in elections and referendums and to stand for election is one of the most important formal legal indicators or 'hallmarks' of citizenship.¹ Elections of representatives are core elements of the democratic production and reproduction of political communities. Referendums constitute acts of direct democracy, some of which are crucial for the purposes of renewing or creating polities or for reforming in important ways the basic constitutions of democratic polities. Modern democracies are unthinkable without universal suffrage,² and international law recognises this in the form of the universal and equal suffrage guarantees in texts such as Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights and Article 3 of Protocol 1 of the European Convention of Human Rights and Fundamental Freedoms (ECHR). The right to vote forms part of the general political freedoms allowing citizens to participate fully in the government of their countries.

Thus from a legal and political perspective, the act of voting seems obvious. It is the individual fulfilment of a right that allows for the collective self-fulfilment of a self-governing community. The challenges involved in defining the boundaries of this community and of applying these boundaries in practice are reviewed in detail elsewhere in this volume,³ and the implications for suffrage rights are briefly

¹ Piers Gardner, ed., *Citizenship. The White Paper* (2007).

² Daniele Caramani and Florian Grotz, 'Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization', *Democratization*, 22, 5 (2015): pp. 799-819.

³ Bauböck in this volume.

discussed in Section 2. We start from the supposition that the franchise⁴ represents the legal articulation of political membership, although the contours of this membership are complex and contested. In Section 3 we explore the history and struggles associated with extensions of and restrictions placed upon suffrage rights, which mean that both historically and also at the present time not all citizens can vote in all elections in all countries, and in some countries political membership incorporates (at least some) non-citizens as well. The particular challenges relating to immigration, emigration and diasporas are the topic of Section 4.

Finally, in Section 5 we turn our attention to voting in referendums and similar mechanisms of direct democracy, in particular those that have the effect of creating, renewing or reforming polities. In such a context, the boundary problem has a particular meaning, as these political acts are specifically concerned with constructing and re-constructing (new) boundaries across territory (e.g. a new seceding state) or sometimes 'horizontally' between polities operating at different 'levels' (e.g. new sub-state or supra-state entities).

While the act of voting may seem self-evidently valuable to scholars of law and politics, given its affinity to discourses of rights and democracy, it is less obviously so for adherents of public choice theory. Scholars since Downs⁵ have pointed out that, whatever the collective benefits, for the individual, considering costs and benefits, it may not seem rational to vote. One vote will almost never sway an election. For some groups such as external voters,⁶ the costs are even greater than for others, and indeed they do depress participation rates. While affording the right to vote in local elections to non-citizens might be seen as an effort to enhance inclusion, in practice other social and economic factors including language barriers and registration difficulties often continue to depress political participation rates below those of the resident citizen population. Yet voting may nonetheless assist in affording a 'we feeling' for a community that has both an individual and collective dimension to it. This can offset the costs of voting. This ideal is the premise that underlies the analysis here.

There are several steps from the franchise to the vote, many of which reduce participation in practice. These include registration and procedural requirements which may be harder for some groups to fulfil than others, and which may thus skew the outcomes of elections. Controversies surrounding voter registration, voter ID laws, and the Federal control over state measures on voting included in the Voting Rights Act until the Supreme Court case of *Shelby County v. Holder* in 2013⁷ all highlight the contested terrain of voting rights practice in the USA, especially in

⁴ In this chapter, the words franchise and suffrage are used broadly interchangeably. 'Suffrage' is strongly associated with historical struggles and with many legal instruments which use the term 'universal suffrage'. However, 'the franchise' is a useful umbrella term for expressing the legal and political possibilities of formally accessing the mechanisms of structured political choice such as elections and referendums, and can include both the active (right to vote) and passive (right to stand or be elected) elements.

⁵ Anthony Downs, *An Economic Theory of Democracy* (1957).

⁶ See Collyer in this volume.

⁷ *Shelby County v. Holder* 133 S. Ct. 2612.

election years such as 2016.⁸ Aside from the minority (n=<30) of countries that have compulsory voting,⁹ there are also social, economic and cultural factors which affect turnout and, in some circumstances, factors affecting the way in which votes are counted¹⁰ which in turn mediate the character of ‘right to vote’ when viewed from a ‘street-level’ rather than an ‘in the books’ perspective. Similar factors impact upon the right to stand for election, and these have often had the effect of reducing the numbers of women or minority ethnic or indigenous group candidates when compared to the general population. This is even before we reach the point of competing for votes, where again such candidates face obstacles gaining political traction in the media, with political parties and amongst the voting public.

Bearing in mind that there are many other ‘citizenship acts’¹¹ that complete the full picture of political participation, including the utilisation of political freedoms such as speech and assembly, political party formation and engagement, and political activism and activation beyond the electoral sphere for citizens and non-citizens alike, this chapter necessarily presents only a limited snapshot of a bigger picture in its focus on the formal right to vote, to stand for election and to participate in referendums. The premise on which this chapter proceeds is that democracy as a whole is not constituted simply by the franchise and rights to vote, but that the franchise is an important first step, deserving of detailed analysis in its own terms.

2. The Boundary Problem: the interrelationship between citizenship status and the franchise

Citizenship ‘creates a legal bond between individual members and a state and endows these individuals with certain rights and obligations’.¹² Stretching or diminishing the scope of citizenship has a significant impact upon a number of important dimensions of the state and political membership, and highlights the fact that citizenship, as marking out a bounded community, necessarily has a ‘boundary problem’. We need to examine the political accountability of those who can set these boundaries and the process whereby boundaries are set, as well as the substantive content of ‘boundary rules’. If it is the citizenry who decide who the citizenry will be

⁸ For brief analysis see Brennan Center for Justice, ‘Voting Laws Round-Up’, <http://www.brennancenter.org/analysis/voting-laws-roundup-2016>, 18 April 2016; Suevon Lee and Sarah Smith, ‘Everything You’ve Ever Wanted to Know About Voter ID Laws’, *Pro Publica*, <https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>, 9 March 2016.

⁹ International IDEA, ‘Compulsory Voting’, http://www.idea.int/vt/compulsory_voting.cfm (page last visited 9 September 2016). For an analysis see Sarah Birch, *Full Participation: A Comparative Study of Compulsory Voting* (2009).

¹⁰ The outcome of the second round of the 2016 Austrian Presidential Election was annulled and ordered to be rerun by the Constitutional Court, on the grounds that some postal votes were mishandled. However, at the time of writing, the re-run itself was set to be postponed after further difficulties with the handling of postal votes were uncovered: ‘Presidential re-run faces delay as Austria comes unglued’, *Financial Times*, 9 September 2016, <https://www.ft.com/content/e7c746f2-7695-11e6-b60a-de4532d5ea35>.

¹¹ Engin Isin, ‘Theorizing acts of citizenship’, in *Acts of Citizenship*, edited by Engin Isin and Greg Nielsen (2008).

¹² Maarten Vink and Rainer Bauböck, ‘Citizenship configurations: Analysing the multiple purposes of citizenship regimes in Europe’, *Comparative European Politics* 11, 5 (2013): pp. 621–648 at p. 622.

in the future – and what rights and duties they will have – then the process of determining the boundary is ultimately purely internal, circular in character and potentially lacking in legitimacy.¹³ There are both practical and normative implications that arise from the setting of boundaries, in terms of deciding who can vote.

For example, what if political membership (either the formal hallmark of citizenship and/or the right to vote itself) were to be restricted only to those persons whose grandfathers were citizens or had the right to vote? Applying principles of equality, we can quickly see that such restrictions are unfair and illegitimate, as they would exclude all newcomers across at least two generations from self-government. They also distinguish between men and women in an arbitrary manner. This may be an egregious example, but it reminds us that choices are made in all polities as to where to set the boundaries of the suffrage and that these will tell us much about the character of any given democracy.

Commentators often focus on the question of the inclusion of newcomers (i.e. immigrants) as the baseline for outlining what model of citizenship a polity has adopted and for ascertaining the democratic and normative principles on which it is based. For example, the citizenship-based or ‘national’ approach¹⁴ holds that immigrants should only acquire the right to vote *after* acquiring citizenship and that the acquisition of citizenship (e.g. by naturalisation) should afford the polity the opportunity to test the degree of engagement of the newcomer with the society into which he or she has entered. Such an approach tends to prioritise the claims of those who acquire citizenship *at birth* over those whose claim to membership is ‘merely’ based on residence in the polity. Yet others have argued that residence itself should be an ascriptive mechanism for the inclusion of newcomers to ensure that their right to participate is upheld.¹⁵

The logic of some approaches to setting boundaries, such as the ‘all affected interests’ principle,¹⁶ holds not only that all those who are within the territorial jurisdiction of the polity should be included but also, potentially, a wider range of persons (regardless of their citizenship) who could be *affected* by the extraterritorial impacts of choices made within the polity (e.g. on matters such as environmental policy which cannot be confined within territorial borders). They too should be given a voice. This is distinct from the usual approach to defending the external participation rights of *citizens*, which are premised less on the present claims of individuals who are located outside the territory as on the ongoing attachment which stems from such individuals being citizens in the formal sense. Principles such as ‘all affected interests’ could be criticised for being over-inclusive and also lacking coherent boundaries. A related approach involves focusing on the potential negative

¹³ David Owen, ‘Constituting the polity, constituting the demos: on the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem’, *Ethics and Global Politics*, 5, 3 (2012): pp. 129-152.

¹⁴ David Miller, ‘Immigrants, Nations and Citizenship’, *Journal of Political Philosophy*, 16, 4 (2008): pp. 371-390.

¹⁵ Joseph Carens, *The Ethics of Immigration* (2013); Ruth Rubio Marín, *Immigration as a Democratic Challenge* (2000).

¹⁶ Robert Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’, *Philosophy and Public Affairs*, 35, 1 (2007): pp. 40-68.

externalities of any given decision as the basis for according the right to vote.¹⁷ Under that perspective, it is the impact on *rights* not *interests* that matters.

Likewise going beyond a focus primarily on incomers is Bauböck's stakeholder citizenship approach, as his model encompasses *external* citizenship and the right to vote of non-resident citizens as well as the issue of the appropriate treatment of newcomers to the polity (i.e. how long, if at all, should they wait before being able to participate in elections).¹⁸ Defining 'stakeholdership' sets thus justifiable boundaries for political membership. Bauböck combines 'stakeholdership' with the concept of citizenship *constellations* to highlight the importance of the interactions between sending and receiving countries in migration contexts, and to articulate the impact of citizenship ascription decisions in the context of secession and polity break-up.¹⁹ 'Stakeholdership' can be, as his chapter in this volume demonstrates, sensitive not only to the interactions between multiple polities and their citizenries, but also between different 'nested' polities, as in the case of the EU Member States *within* the context of the European Union (and within the context, in several states, of an internal federal or quasi-federal distribution of powers). 'Rightsizing' the *demos* is therefore a task that needs to take into consideration the multi-layered character of citizenship rights and practices in multi-level constitutional contexts as well as to the multiple interactions between different states in the international domain.²⁰

The key point to emphasise is that there is a tension between the boundaries of the suffrage, the boundaries of the citizenry and the literal territorial boundaries of the polity (i.e. who can gain admission). Under conditions of increasing globalisation, it is clear that there is not a perfect congruence between citizenship, territory and sovereignty, and indeed there never has been. The task then is to settle the most appropriate way of dealing with this where states are not the only relevant determinants of membership, and where states themselves have overlapping and blurred boundaries. Some states institute multiple obstacles to participation, leading to claims for more inclusion,²¹ while others are more open and permeable. The EU is an interesting case. While the Member States still 'own' national citizenship (as a gateway for EU citizenship), they which must give certain rights to mobile EU citizens, including rights of residence, access to the labour market and many other social goods, and the principle of non-discrimination. Yet free movement has become

¹⁷ Ben Saunders, 'Defining the Demos', *Politics, Philosophy and Economics*, 11, 3, (2014): pp. 280-301.

¹⁸ Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', *Fordham Law Review*, 75, 5 (2007): pp. 2393-2447.

¹⁹ Rainer Bauböck, 'Studying Citizenship Constellations', *Journal of Ethnic and Migration Studies*, 36, 5 (2010): pp. 847-859.

²⁰ Rainer Bauböck, 'Morphing the Demos into the right shape. Normative principles for enfranchising resident aliens and expatriate citizens'. *Democratization*, 22, 5 (2015): pp. 820-39; Jean-Thomas Arrighi and Rainer Bauböck, 'A multilevel puzzle. Migrants' voting rights in national and local elections'. *European Journal of Political Research* (2016 forthcoming).

²¹ Cristina Rodríguez, 'Noncitizen voting and the extraconstitutional construction of the polity', *International Constitutional Law Journal*, 8, 1 (2010): pp. 30-49; Heather Lardy, 'Citizenship and the right to vote', (1997) 17 *Oxford Journal of Legal Studies* 75-100; Ludvig Beckmann, 'Citizenship and Voting Rights: Should Resident Aliens Vote?', *Citizenship Studies* 10, 1, (2006): pp. 153-165.

much more controversial in the EU in recent years, not least because of the challenges it poses to the citizenship regimes of the Member States, e.g. because of the rights of EU citizens to vote in the host state local elections (see Section 4).

Furthermore, external citizenship is often vitally important for understanding a polity's broad approach to ascribing membership,²² and yet internal and external inclusivity often do not go hand in hand. However, in contrast to the case of resident non-citizens whose political participation rights are still relatively sparse, the non-resident citizens seem to have gained greater traction on the body politic in terms of the argument for widening the suffrage, as Section 4 shows.

In practice, different models of membership²³ remain hard to match to actually existing political circumstances in any pure form. In his chapter, Bauböck provides examples to highlight the bewildering complexity of boundary problems in real world situations. The United Kingdom, with enjoys complex and confusing interaction between the rules on citizenship and the right to vote, illustrates the point well. In the UK, the status of citizenship and its associated rights and duties resemble a historical bricolage more than they do a coherent constitutional design.²⁴ These include the right to vote and to stand in all UK elections for citizens of the countries of the Commonwealth of Nations (most but not all of which were former British colonies) and of Ireland.²⁵ So when this historical patchwork of voting rights came under review in a report on citizenship commissioned by then Prime Minister Gordon Brown,²⁶ it quickly became apparent that a decision by the UK legislature to exclude Irish citizens from the UK franchise, except where their participation is presently demanded by EU law, would have profound implications in Northern Ireland under the terms of the Good Friday Agreement. This creates a form of UK/Republic of Ireland condominium across the province, especially in relation to citizenship matters. When politicians weigh up the desirability of a neat political settlement for citizenship rights against the challenges of maintaining peace and good neighbourly relations in a place like Northern Ireland, they may understandably opt for the latter.

Similarly, in Latin America ebbing and flowing patterns of democratisation and retreat from democracy, waves of immigration and emigration, and post-colonial industrialisation have had an impact on a complex pattern of citizenship regimes, including the granting and withdrawal of voting rights for non-citizen residents and non-resident citizens over many years.²⁷ Escobar argues that while historically most changes could be put down to domestic factors, more recently exogenous factors

²² Bauböck n.20.

²³ Jo Shaw and Anja Lansbergen, 'National Membership Models in a Multi-Level Europe', *International Journal of Constitutional Law*, 8, 1 (2010): pp. 50-71.

²⁴ Caroline Sawyer and Helena Wray, *United Kingdom*, EUDO Citizenship Country Report on Citizenship Law, (December 2014), www.eudo-citizenship.eu.

²⁵ Lamin Khadar, *Access to Electoral Rights. United Kingdom*, (June 2013), www.eudo-citizenship.eu.

²⁶ Lord Goldsmith QC, *Citizenship: Our Common Bond*, Citizenship Review, March 2008, <http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/citizenship-report-full.pdf>.

²⁷ Cristina Escobar, 'Immigrant enfranchisement in Latin America: From strongmen to universal citizenship', *Democratization*, 22, 5 (2015): pp. 927-950.

including globalisation, foreign relations and regional integration have influenced countries in legislating on the scope of citizenship and voting rights.

3. The 'selection' of voters: legal, political and historical considerations

In a democracy, laws regulate who can vote in an election or a referendum, or stand for election.²⁸ In many instances the basic principle lies in the constitution, which is then a reference point for any challenges to the principle of universal suffrage. One interesting case where this is not so, at least not in an explicit manner, is in the United States of America where (restricted) access to the ballot box for certain groups has been an enduring and intensely racialised theme²⁹ of the country's democratic evolution. Amongst the legal and administrative mechanisms that continue to depress political participation amongst racial minorities in recent years, felon disenfranchisement has come to stand out. Nor is there an express constitutional right to vote in the UK, although it has been suggested that were Parliament to enact an egregious restriction on universal suffrage that the courts may interfere with such an Act of Parliament by invoking a 'common law right'.³⁰

In addition to national (and sometimes subnational) law, European and international law may also impose legal constraints on the exercise of this 'sovereign' power. As noted earlier the right to vote in democratic elections in the form of 'universal suffrage' is enshrined in a number of international instruments, and there could be said to be a consensus in international law.³¹ It has been explicitly recognised by the European Court of Justice in respect of voting in European Parliament elections.³² The European Court of Human Rights has discussed the scope of Article 3 of Protocol 1 extensively.³³ One can cite also the work of international bodies such as the Venice Commission of the Council of Europe and the UNHCR which specialise in the production of 'soft law'. They have pushed in the direction of common standards in some difficult areas, e.g. facilitating the political participation of refugees in the politics of the state of origin (a special case of out-of-country voting) and ensuring that they have rights to participate in the

²⁸ Information about the conditions for accessing electoral rights in many European and American countries is available from the EUDO Citizenship website: <http://eudo-citizenship.eu/electoral-rights/conditions-for-electoral-rights-2015>.

²⁹ Alexander Keyssar, *The Right to Vote. The Contested History of Democracy in the United States* (2000).

³⁰ *Moohan and Another v. Lord Advocate* [2014] UKSC 67 (prisoner voting and the Scottish referendum) briefly discussed by Court of Appeal in *Shindler and MacLennan v. Chancellor of the Duchy of Lancaster and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin) on the exclusion from the EU referendum franchise of UK citizens resident outside the UK for more than 15 years. See Jo Shaw, 'Unions and citizens: membership status and political rights in Scotland, the UK and the EU', in *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, edited by Carlos Closa (2017 forthcoming).

³¹ Shai Dothan, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement', in *Comparative International Law* edited by Anthea Roberts, Pierre Verdier, Paul Stephan, and Mila Versteeg (2016).

³² Case C-650/13 *Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, ECLI:EU:C:2015:648.

³³ *Hirst v. the United Kingdom (no. 2)*, no. 74025/01, 30 March 2004; *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012.

state of residence even in advance of acquisition of citizenship.³⁴ While the principle is well established, there is however no consensus in relation to the legitimate restrictions that may be placed upon such a right by states, in particular in relation to prisoner disenfranchisement and mental capacity and thus mixed evidence about any convergence around liberal norms amongst states.

While the most blatant gender-based or race-based examples of restrictions on the suffrage have now been removed, at least in the more stable and well developed democracies, politics can and do apply various tests of residence, age, capacity/competence and probity in order to determine the scope of the franchise, and apply different rules for different classes of elections or votes. The history of the franchise is one of contestation and social struggles, paralleling the history of struggles by certain groups to be seen as full citizens. Persons without property or who were illiterate, women and people of colour including indigenous peoples were routinely denied the vote during the nineteenth and well into the twentieth centuries, precisely because they were not seen as 'full' citizens denied capacity in the same way that children, for example, are still generally denied the right to vote. If these groups were not full citizens it was simply 'natural' that they should not have full civil, political and indeed social rights. The outcomes of these struggles can be seen in legislation and sometimes in judgments of courts, as in the famous 'Persons' case in Canada in the 1920s.³⁵

There is ongoing debate about the triggers of change, especially in relation to the most significant franchise extensions, namely those to working class men and to women, as well as the removal of explicit racial bars. Was the vote struggled for, as class, gender or racial politics might suggest, or conceded legislatively as part of a wider modernisation process³⁶ in which parties competed for electoral success which a wider electorate might assist? Important national and international social movements pushed towards women's suffrage and there were dramatic changes between the end of the nineteenth century and the middle of the twentieth century.³⁷ But Teele argues that the granting of the vote to women in the UK was the result of a bargain between the more reformist parts of the women's movement struggling for suffrage and the nascent Labour Party, rather than social movement pressure.³⁸ Elsewhere, some historians of democratisation have spoken of the impact of the wars and emergency situations, generating the need for armies and labour that have liberated previously disenfranchised groups, including working class men.³⁹ Certainly the story of women's suffrage is not simple. In Europe, for example, 'modern' states often denied women political rights they had exercised

³⁴ Ruvi Ziegler, *Voting Rights of Refugees*, (2017).

³⁵ *Edwards v. Canada (AG)* [1930] A.C. 124.

³⁶ Adam Przeworski, 'Conquered or Granted? A History of Suffrage Extensions'. *British Journal of Political Science*, 39, 2 (2009): pp 291-321.

³⁷ Francisco Ramirez, Yasemin Soysal, and Suzanne Shanahan, 'The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890-1990,' *American Sociological Review* 62 (October 1997): pp. 735-45.

³⁸ Dawn Teele, 'Ordinary Democratization: The Electoral Strategy That Won British Women the Vote', *Politics & Society*, 42, 4 (2014): pp. 537-561.

³⁹ Ruth Berins Collier, *Paths toward Democracy: The Working Class and Elites in Western Europe and South America*, (1999).

under so-called ‘ancien’ regimes.⁴⁰ Rubio Marín describes this as an ‘inverted pathway’. For decades, women remained vulnerable to the risk of losing franchise rights they thought they had acquired in one state as a result of the almost universal practice of marital denaturalisation.⁴¹ Even today gender-based restrictions still retain some traction: for example, women were only allowed to vote for the first time in Saudi Arabia in municipal elections in December 2015.

In the USA, the story of restrictions on the right to vote is fully embedded within the broader post-slavery story of gradual black emancipation. While significant constitutional and legislative steps have been taken including the 15th Amendment and the Voting Rights Act 1965, especially at the federal level, at the state and local level *de jure* and *de facto* restrictions have proved remarkably enduring and have continued to damage the democratic fabric of the country. As was the case in many Latin American countries,⁴² racially focused restrictions have often acquired the surrogate form of a literacy requirement. From the 19th through to the 21st century, many of the same concerns have coalesced about the issue of felon disenfranchisement, which is a standard and often permanent consequence of certain criminal convictions in the USA. This practice disproportionately impacts African Americans and it may have affected the outcomes of elections, including the 2000 US Presidential Election.⁴³

Restrictions on prisoner voting are common in many other countries, albeit rarely with the same scope or effects as in the USA. In the UK, the issue of prisoner voting has become a lightning conductor for more general discontent with the impact of the UK’s adherence to the ECHR, after the judgment in *Hirst (No. 2)*⁴⁴ established that the UK’s current blanket ban on convicted prisoners voting infringed Article 3 of Protocol 1 and could not be saved by the principle that allows contracting states a certain level of discretion when it comes to implementing rights within a democratic society. There is an ongoing dispute between the UK’s political authorities (executive and legislature) and the Court of Human Rights, with the UK Courts and the Council of Europe’s political authorities standing in the middle. The UK’s approach, with such a broad ban, is out of line with that across most of Europe⁴⁵ and indeed that of other states such as Australia.⁴⁶ Politically and normatively, there is no consensus about whether (all or some) prisoners should vote.⁴⁷

⁴⁰ Ruth Rubio Marín, ‘The achievement of female suffrage in Europe: on women’s citizenship’, *International Journal of Constitutional Law*, 12,1 (2014): pp. 4-34.

⁴¹ Helen Irving, *Citizenship, Alienage and the Modern Constitutional State: A Gendered History*, (2016).

⁴² Tanya Hernandez, *Racial Subordination in Latin America. The Role of the State, Customary Law, and the New Civil Rights Response*, (2014).

⁴³ See Christopher Uggen and Jeff Manza, ‘Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States’, *American Sociological Review*, 67, 6 (2002); pp. 777-803.

⁴⁴ *Hirst (No. 2)* n.33.

⁴⁵ Dothan n.31.

⁴⁶ *Inside outcasts: prisoners and the right to vote in Australia*, Current Issues Brief, No.12 2003-2004. http://apo.org.au/files/Resource/04cib121_0.pdf.

⁴⁷ Peter Ramsay, ‘Voters should not be in prison! The rights of prisoners in a democracy’, *Critical Review of International Social and Political Philosophy*, 16, 3 (2013): pp. 421-438.

Also of interest (and perhaps an example of the effective international diffusion of norms) have been the trends towards a widening of access to the franchise for persons with mental disabilities or suffering from mental illness. This has been tracked by the European Union's Fundamental Rights Agency,⁴⁸ buttressing case law of the European Court of Human Rights. Pointing out that restrictions on vulnerable social groups which have faced considerable discrimination in the past demand very weighty justifications, in *Alajos Kiss v Hungary*, the Court overturned a blanket provision which denied voting rights to mentally disabled people under partial guardianship in Hungary.⁴⁹ New measures were introduced in Hungary after the judgment to permit case-by-case scrutiny by a judge of whether a person who is under guardianship should be disenfranchised.

Worldwide large numbers of countries continue to have blanket bans on the participation of those with mental impairments. In the USA, more than 40 states disenfranchise people based on their mental status. Like so many other restrictions on the right to vote, this can have effects that are more restrictive of the voting rights of African Americans and Native Americans, who are disproportionately affected by mental illness.⁵⁰ The same could be true in Australia,⁵¹ when combined with the fact that Aboriginal Australians are over-represented in the prison population, prisoners are more prone to mental illness, and prisoners serving sentences of more than three years lose the right to vote. This contributes to an outcome where only 58% of Indigenous Australians are registered to vote.⁵²

States also continue to impose restrictions on standing for (high) office on naturalised citizens or citizens born outside the territory (most famously the US President) and on dual citizens. Here the traditional question mark over the loyalty of those apparently owing allegiance to two sovereigns raises its head, although in many other spheres states have lifted their opposition to dual citizenship. In the *Tanase* case involving parliamentary elections in Moldova,⁵³ the European Court of Human Rights held that a dual citizenship restriction on standing for election was intended to have political effects rather than to protect the sovereignty of the state, and thus contrary to Article 3 of Protocol 1 of the ECHR.

4. Right-sizing the electorate in contexts of migration

⁴⁸ Fundamental Rights Agency, *The right to political participation of persons with mental health problems and persons with intellectual disabilities* (2013).

⁴⁹ *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010.

⁵⁰ Rabia Belt, *Mental Disability and the Right to Vote*, (PhD Dissertation, University of Michigan, 2015).

⁵¹ For a summary of the right to vote in Australia, see <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/right-vote-not-enjoyed-equally-all-australians#f20a>.

⁵² Paul Daley, 'Only 58% of Indigenous Australians are registered to vote. We should be asking why', *The Guardian*, 30 June 2016, <https://www.theguardian.com/commentisfree/2016/jun/30/only-58-of-indigenous-australians-are-registered-to-vote-we-should-be-asking-why>.

⁵³ *Tanase v Moldova*, Application no. 7/08, ECtHR, 27 April 2010.

Mobility and migration (immigration and emigration) provide important laboratories for political scientists to try to figure out how and why states make certain choices about voting rights, as well as for lawyers and political theorists to observe the real world traction of the models of the *demos* that they construct (see Section 2). In other words, the issue sets both policy and normative challenges. The main policy contexts here are diaspora engagement (i.e. citizenship, voting rights and other policies to engage those not on the territory) and the integration of immigrants (measures to support the voting rights and practices of those who do not have citizenship or who may only recently have acquired it). As Bauböck has argued,⁵⁴ the two questions are interconnected in significant ways, as are the questions of access to citizenship and access to the franchise. For example, in the USA, many Asian Americans were effectively excluded from the franchise for many decades because they were refused access to citizenship by a combination of legislation such as the Chinese Exclusion Act of 1882 and case law which interpreted access to naturalization as being restricted to ‘free white people’. In contrast, those of Asian descent born in the USA did benefit from the *ius soli* protection of the 14th Amendment.⁵⁵ The other important interconnection is between the policies and laws that grant (or deny) political participation rights and the voting behaviour and political participation of those subject to these policies. This chapter concentrates only on the first of these elements.

Some polities permit resident non-citizens to vote. More than 60 countries worldwide allow for some or all resident non-citizens to vote in some or all local or municipal elections, but fewer than 10 countries allow some or all resident non-citizens to vote in national elections.⁵⁶ The best known case of so-called ‘alien suffrage’ is undoubtedly the European Union, which requires its Member States, since the Maastricht Treaty, to confer the right to vote in local (and European Parliament) elections on resident (i.e. mobile) non-national EU citizens. This is a unique (thus far) example of international impact upon domestic voting rights legislation and of a comprehensive reciprocal framework, with limited examples of upgrades and adjustments. The UK gives the right to vote and to stand for election to EU citizens in the elections to devolved bodies and legislatures (e.g. Scotland and Wales) under UK law. When Slovenia introduced EU voting rights prior to its accession in 2004, it included the right to vote (but not to stand for election) for third country nationals in its new legislation. Belgium and Luxembourg have benefited from limited additional derogations based on certain demographic conditions, allowing the imposition of additional residence tests on voters. In Austria and Germany, where certain cities are simultaneously also ‘states’ under the national federal systems, EU citizens only have the right to vote in low level civic councils with few meaningful powers.

⁵⁴ Bauböck n.20.

⁵⁵ Ian Haney Lopez, *White by Law*, (2006).

⁵⁶ Rainer Bauböck, ‘Expansive Citizenship – Voting beyond Territory and Membership’, *PS: Political Science and Politics*, 38, 4 (2005): pp. 683-687; on the EU28 see Iseult Honohan and Derek Hutcheson, ‘Transnational Citizenship and Access to Electoral Rights: Defining the *Demos* in European States’, in *The Act of Voting: Identities, Institutions and Locale*, edited by Johan Elkink and David M. Farrell, (2015), pp. 59-79.

Beyond those requirements, some EU states have instituted local electoral rights for all non-citizens (i.e. including third country nationals) with stable residence (i.e. satisfying a qualifying residence period), in most cases quite separately from the measures taken in relation to EU citizens: Belgium, Ireland, Luxembourg, Netherlands, Denmark, Sweden, Finland, Estonia, Lithuania, Hungary, Slovakia and Slovenia.⁵⁷ In Ireland, Netherlands and the Nordic states, these rights predate the Maastricht Treaty. All bar Belgium, Luxembourg, Estonia, Hungary and Slovenia have granted also the right to stand for election. Unsurprisingly, there is considerable overlap between this group of states and the EU Member States that have ratified or signed the 1992 Council of Europe Convention on the Political Participation of Foreigners in Local Life which commits its signatories to ensuring political freedoms for non-nationals and local electoral rights.⁵⁸ In a number of states there are also arrangements for selected groups of third country nationals to vote in local elections either on the basis of historic ties (Commonwealth and Irish citizens in the UK) or on the basis of reciprocity arrangements (often, but not always, coupled with historic ties). Reciprocity arrangements exist in Portugal (on the basis of citizenship of a Portuguese-speaking country),⁵⁹ and in Spain (originally only applicable to Norway, but extended as of 2009 towards Bolivia, Cape Verde, Chile, Colombia, Ecuador, Iceland, New Zealand and Uruguay).⁶⁰

Looking beyond Europe, the Commonwealth of Nations, already referred to above, is an important framework within which reciprocal electoral rights are allocated to resident non-citizens (e.g. in Caribbean countries). In Latin America, Escobar⁶¹ has highlighted quite a strong trend towards immigrant suffrage in local elections, albeit under varied conditions and according to a variety of timescales, mapped against processes of state formation and reformation and the ebbs and flows of democratic and authoritarian government on that continent. Meanwhile, very few countries allow non-citizens to vote in national elections – the UK (Commonwealth and Irish citizens), Ireland (UK citizens) and Barbados, Uruguay and New Zealand (citizens satisfying certain residence requirements) being amongst that small group. In 2015 a referendum was held in Luxembourg on the question of giving electoral rights in national elections to migrants, but the proposal was rejected by 78% of voters.⁶²

Rodriguez argues that it is hard to discern clear patterns driving the decision to grant or to deny voting rights for third country nationals in elections, across groups of states.⁶³ Her comparison of the USA, New Zealand and Ireland – states which all have a history and/or a present practice of alien suffrage – indicates that there is no fixed relationship between granting electoral rights, the national constitutional structure, or evolving perceptions of immigration. Shifts between immigration and emigration can indeed be significant, as Escobar has shown in the case of Latin America.⁶⁴ Likewise, we can see the impact of constitutional practices.

⁵⁷ See Jo Shaw, *The Transformation of Citizenship in the European Union*, (2007), pp. 76-82.

⁵⁸ ETS No. 144; opened for signature on 5 February 1992; entered into force on 1 May 1997.

⁵⁹ Claire Healy, *Access to Electoral Rights. Portugal*, (June 2013), www.eudo-citizenship.eu.

⁶⁰ Ángel Rodríguez, *Access to Electoral Rights. Spain*, (June 2013), www.eudo-citizenship.eu.

⁶¹ Escobar, n.27.

⁶² Michèle Finck, 'Towards an Ever Closer Union Between Residents and Citizens?', *European Constitutional Law Review*, 11, 1 (2015): pp 78-98.

⁶³ Rodríguez, n.21.

⁶⁴ Escobar, n.27.

Constitutional blockages have restrained subnational entities from proceeding with more liberal policies towards third country national voters where political opinion has differed from the national-level mainstream in Germany and Austria.⁶⁵ In Ireland in the 1980s a similar constitutional blockage was removed by means of a referendum in order to permit UK citizens to vote in Irish national elections (but not referendums, Senate Elections or Presidential elections). Ultimately it is hard to generalise simply on the basis of case studies, and Rodríguez concludes that ‘a society’s decision to adopt a particular set of alien suffrage practices reflects its own political culture’.⁶⁶

One way of dealing with the voting rights of immigrants is simply to transfer the decision to the sphere of citizenship acquisition: immigrants may only vote after naturalisation. Many states do choose that route, and consequently attention shifts to the question of how restrictive or liberal states are in relation to naturalisation. Rodríguez again suggests there is no firm correlation between the decision to grant or to deny electoral rights to non-nationals and the specific approach which a polity opts for in relation to the broader issue of immigrant incorporation. In other words, it does not map directly onto what might be viewed as an overall open or restrictive policy focus. Nor is there necessarily a direct relationship between approaches to electoral rights and the possibility of citizenship acquisition, either via the time limits, conditions and procedures attaching to naturalisation, or via the willingness of certain polities to give *ius soli* citizenship to the children of non-citizen migrants.

Political parties in some polities such as Germany and Austria have promoted non-citizen voting as part of a wider policy on migration and citizenship. Thus those on the left see giving electoral rights in advance of the acquisition of citizenship as a dimension of a pathway *towards* integration and those on the right see political participation as a reward for a specific step *of* integration, namely the voluntary acquisition of citizenship through naturalisation which, in those polities given their positions on dual citizenship, requires third country nationals to give up the citizenship of birth. But steps taken by leftwing political parties have often encountered barriers erected by constitutional courts to protect the integrity of ‘the people’. These can have a chilling effect on political debate on these matters, given the enhanced parliamentary majorities needed for constitutional amendments.⁶⁷

Some political science work does move beyond case studies and examines trends on a cross-country and cross-time basis. Earnest, for example, highlights that international factors may affect the timing of changes to the right to vote for immigrants, but the content of changes at the national level are generally influenced by domestic factors.⁶⁸ In other work, Earnest has examined the relationship between the extension and *reversal* of policies concerned with liberalising citizenship as well as extending the franchise.⁶⁹ His focus here was on

⁶⁵ Shaw, n.57.

⁶⁶ Rodríguez, n.21, p. 49.

⁶⁷ Shaw, n.57, p. 298

⁶⁸ David Earnest, ‘Expanding the Electorate: Comparing the Noncitizen Voting Practices of 25 Democracies’, *Journal of International Migration and Integration*, 16, 1 (2015): pp. 1–25.

⁶⁹ David Earnest, ‘The enfranchisement of resident aliens: variations and explanations’, *Democratization*, 22, 5 (2015): pp. 861–883.

the interrelation between ‘policy constraints’ and ‘national resilience’. These findings highlight the many different variables that need to be taken into account, in relation not only to the types of legal provisions that may be enacted, but also in relation to the national and international context of changes to electoral rights. As immigration represents an increasingly ‘toxic’ issue in many national political debates, Justwan may well be correct to highlight that issues of ‘generalized trust’ across society need to be taken into consideration in this context.⁷⁰ That has to be balanced against what others have termed the ‘democratic’ potential of enfranchising migrants.⁷¹

In contrast, surveys of external voting for emigrants and their descendants show that this represents a genuine global trend, with more than 120 countries worldwide allowing some or all external citizens to vote,⁷² typically in national elections, less frequently in local or regional/state elections.⁷³ Collyer, in this volume, argues that external voting finds its place within a larger framework of ‘transnational citizenship’, with a variety of political and economic factors including party interests, development and remittances and the ease of political information flows all contributing to the creation of more or less liberal external voting regimes. In sum, states have to balance diaspora engagement against the fear that external voters may be given too much weight in the domestic sphere and may restrict political developments that residents wish to see. For Lafleur, setting policies will include transnational negotiation processes that engage not only the citizen and the sending state, but also the host state.⁷⁴ Hutcheson and Arrighi, meanwhile, concentrate on the various hurdles that states set for external voters who exercise their rights.⁷⁵ As with non-citizen residents, their participation rates are low.

Scholarly work on emigrants and diasporas is also more heavily slanted towards single country or regional case studies, rather than being based on broader aggregate datasets, not least because of the absence of reliable data hitherto. The collection of data across multiple states worldwide on electoral rights by the EUDO Citizenship Observatory will help to offset this in relation to both emigrants and immigrants.

5. Constituting and renewing the polity

⁷⁰ Florian Justwan, ‘Disenfranchised minorities: Trust, definitions of citizenship, and noncitizen voting rights in developed democracies’, *International Political Science Review*, 36, 4 (2015): 373-392.

⁷¹ Luicy Pedroza, ‘The Democratic Potential of Enfranchising Resident Migrants’, *International Migration*, 53, 3 (2015): pp. 22–35.

⁷² International Institute of Democracy and Electoral Assistance, *Voting from Abroad*, (2007); Michael Collyer, ‘A geography of extra-territorial citizenship: Explanations of external voting’, *Migration Studies*, 2, 1 (2014): pp. 55–72.

⁷³ Arrighi and Bauböck, n.20.

⁷⁴ Jean-Michel Lafleur, ‘The enfranchisement of citizens abroad: variations and explanations’, *Democratization*, 22, 5 (2015): pp. 840-860.

⁷⁵ Derek Hutcheson and Jean-Thomas Arrighi, ‘“Keeping Pandora’s (ballot) box half-shut”: a comparative inquiry into the institutional limits of external voting in EU Member States’, *Democratization*, 22, 5 (2015): pp. 884-905.

Referendums play a special role in the creation of polities, their renewal, and the renovation of their constitutional foundations. *A fortiori*, the question of who can vote is crucially important both normatively – in the sense of constitutional designs and polity models – and practically, not least because some states or parts of states subject to authoritarian rule may have extremely large diasporas which could outweigh the resident population. Such instances also pose particular challenges around the question of effective voter registration.

We can distinguish between a number of different cases: voting rights in self-determination plebiscites (on devolution/autonomy, on redrawing internal jurisdictional boundaries within states, on secession/independence, on EU membership, etc.) and voting rights in the first and subsequent elections in a new polity (or an emerging democracy). These topics touch upon the substance of a number of chapters in this volume including those on post-transition states (Shevel), post-colonial citizenship (Sadiq), citizenship beyond Western contexts (Chung) supranational citizenship (Strumia) and multilevel citizenship (Maas). They also interconnect with topics considered in the sections above, especially as regards the question of external voting. In what circumstances do external citizens have sufficient ‘stake’ in the community to be permitted to vote at such points of change? What of the case of those who are victims of forced migration, either as refugees/asylum-seekers or under some other form of internationally protected status? Should they and/or their descendants be afforded opportunities to participate when, for example, a previous authoritarian regime collapses, even if they are no longer formally recognized as citizens?

In line with that question, it is important to note that changes to voting in referendums and first/subsequent elections may eschew the ‘normal’ trajectory solely towards liberalisation and greater inclusion. There are some examples of the franchise being narrowed down to just citizens. For example, after completing the independence process and after the crystallisation of their own citizenship regimes, Canada and Australia (mostly) removed the franchise from British subjects/citizens and the USA removed the franchise from those intending to naturalise.⁷⁶ In South Africa, where the post-Apartheid transitional constitutional arrangements were initially more liberal, the rules now restrict voting to citizens alone.⁷⁷ Estonia held a number of plebiscites in the process of gaining independence from the Soviet Union, with some of the earlier ones including a wider range of resident voters than were able to accede to citizenship on independence.⁷⁸ The latter cases accord with the post-conflict/transition point highlighted above. In such cases, census data (or the lack of it) can be crucial to the process of trying to document the list of voters reliably. This has been the case in Lebanon, where the last census was held in 1932, and Bosnia-Herzegovina where wars and mass population movements gave rise to

⁷⁶ Monica Varsanyi, ‘The Rise and Fall (and Rise?) of Non-citizen Voting: Immigration and the Shifting Scales of Citizenship and Suffrage in the United States’, *Space and Polity*, 9, 2 (2005): pp. 113–134.

⁷⁷ Wessel Le Roux, ‘Residence, representative democracy and the voting rights of migrant workers in post-apartheid South Africa and postunification Germany (1990-2015)’, *Verfassung in Recht und Übersee*, 48, 3 (2015): pp. 284-304.

⁷⁸ Stephen Day and Jo Shaw, ‘The Boundaries of Suffrage and External Conditionality: Estonia as an Applicant Member State of the EU’, 9 *European Public Law*, 9, 2 (2003): pp. 211-236.

huge changes between the 1991 census (as part of the Socialist Federal Republic of Yugoslavia) and the 2013 census.⁷⁹

Even in times of ‘normal’ democratic political evolution, there may be intense contestation over the scope of the right to vote. We saw this in the 2014 Scottish independence referendum and the 2016 UK referendum on membership of the European Union. The interplay between the right to vote in these constitutionally significant referendums and the political choices that underpinned the Yes/No and Leave/Remain options on the voting papers is instructive.⁸⁰

The Scottish referendum franchise was designed on the basis of the franchise for the Scottish Parliament elections, which includes EU citizens pursuant to an upgrading of their existing voting rights. The Scottish Parliament was given the task of fixing the precise modulation of the right to vote for the referendum in the Scottish Independence Referendum (Franchise) Act 2013 and it chose to include not only EU citizens but also 16 and 17 year olds. The latter benefited from the argument that younger voters were those with most to gain or to lose as a result of the referendum, and that this would be a good way of catalysing the political engagement of a new generation. The franchise excluded all external voters whether resident elsewhere in the UK or outside the UK, in line with all UK local and regional elections. In comparison, the UK EU referendum franchise was based almost precisely on the current franchise for elections to the Westminster Parliament. Accordingly, this gave the right to vote not only to resident UK citizens, but also to Commonwealth and Irish citizens (as with every UK election) and UK citizens resident outside the UK for no more than 15 years. However, EU citizens and the 16 and 17 year olds were not given the vote despite efforts to introduce amendments to the EU Referendum Act 2015 during its passage through Parliament. Three excluded categories of person, namely the longer term non-resident citizens, EU citizens and the younger voters could be said to be those most acutely affected by the referendum outcome, in particular because the vote on 23 June 2016 produced a relatively narrow vote to leave (by a margin of 1.27m votes where 33.5m votes were cast). The numbers of people ‘excluded’ comfortably exceeded the numerical difference between the Leave voters and the Remain voters.

In many respects, these variegated solutions to the question of who should vote in two extraordinarily important referendums held in the UK within less than two years (as well as any possible future second Scottish referendum that may occur because Scotland voted by a substantial majority for the remain option⁸¹) reflect the mottled tapestry of citizenship and electoral rights outlined in this chapter in both the UK and many other countries. While Ziegler argued that the franchise in the Scottish referendum should have – as closely as possible – shadowed the likely future citizenry of any future independent Scotland, Bauböck’s call to treat the referendum franchise as a reflection or upgrading of the actually existing regional

⁷⁹ Florian Bieber, ‘The Construction of National Identity and its Challenges in Post-Yugoslav Censuses’, *Social Science Quarterly*, 96, 3 (2015): pp. 873–903.

⁸⁰ Shaw, n.30.

⁸¹ Scotland voted to remain by 62% to 38% with no Council area recording a majority vote to leave. Northern Ireland also voted (more narrowly) to remain and Gibraltar had more than 95% of its small electorate voting to remain.

citizenry rather than some speculative future ‘national’ citizenry is both normatively appealing and practically sound, given the challenge of trying to figure out and enable the registration of any other putative electorate.⁸² Ziegler has also argued that the franchise in the EU referendum gives rise to the argument that the UK’s general election franchise should itself be revised.⁸³ However, that reminds us that this franchise, like many, is the result of a set of historically contingent decisions that would be hard to change piecemeal, decisions which have significant international repercussions because of relations between the UK and Ireland over Northern Ireland noted in Section 2.

6. Conclusions

In this chapter, we have reviewed a range of ways in which citizenship intersects with the right to vote, allowing us to probe the contribution of citizenship as a legal status underpinning the definition of the franchise to democratic self-government as a political ideal. The struggle for universal suffrage has been a paradigmatic political struggle in the modern state, as people have striven to achieve full and equal citizenship. As a result, the right to vote now operates an enforceable human right under national and international law, blurring the distinction between citizens’ rights and human rights.⁸⁴ This is part of the ongoing transformation of citizenship as a status and as a bundle of rights.

We have also seen that these intersections raise both normative and practical questions, and that as we acquire more reliable data about the boundaries of the suffrage across place and time we will be better able to understand how these map on to other dimensions of political inclusion and exclusion. Studies of voting rights have hitherto been dominated by a case study approach and by ‘western’ cases strongly influenced by postwar narratives of immigration. Work in the future will be able to draw on an increasing portfolio of evidence of democratic practices across states and other ‘state-like’ polities, including a small number of supranational organisations that organise elections, as well as different and perhaps increasingly fluid forms of human mobility.

Normatively, the study of electoral rights is one of the fields in which theorists can identify areas of overlap and blurring between different membership statuses. With greater mobility of populations, the global spread of elections and external voting rights, as well as the increased tolerance of dual citizenship both for those who acquire citizenship by birth and by naturalisation, these complex intersections are likely to increase rather than diminish in the future.

⁸² See Ruvi Ziegler, ‘Kick off contribution’ and R. Bauböck, ‘Regional Citizenship and Self-Determination’, in *Independence Referendums: Who should vote and who should be offered citizenship?*, edited by Ruvi Ziegler, Jo Shaw and Rainer Bauböck (2014) EUI Working Paper RSCAS 2014/90.

⁸³ Ruvi Ziegler, ‘The “Brexit” Referendum: We Need to Talk about the (General Election) Franchise’ (7 October 2015) *UK Constitutional Law Association Blog*, <https://ukconstitutionallaw.org/2015/10/07/ruvi-ziegler-the-brexit-referendum-we-need-to-talk-about-the-general-election-franchise/>.

⁸⁴ Igor Štikš and Jo Shaw, ‘Citizenship Rights: Statuses, Challenges and Struggles’, *Belgrade Journal of Media and Communications*, 6 (2014): pp. 73-90.

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